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No. 82-1795

In the Supreme Court of the United States

OCTOBER TERM, 1982

CAPITOL CITIES CABLE, INC.; COX CABLE OF
OKLAHOMA CITY, INC.; MULTIMEDIA CABLEVISION,
INC., and SAMMONS COMMUNICATIONS, INC.,
Petitioners,

v.

RICHARD A. CRISP, DIRECTOR, OKLAHOMA
ALCOHOLIC BEVERAGE CONTROL BOARD,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for
The Tenth Circuit

**BRIEF OF AMICI CURIAE
OKLAHOMA PRESS ASSOCIATION
AND OUTDOOR ADVERTISING ASSOCIATION
OF OKLAHOMA IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI**

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**STATEMENT OF INTEREST OF
AMICI CURIAE**

The Oklahoma Press Association is an Oklahoma corporation whose membership includes 256 Oklahoma newspapers engaged in the business of newspaper publishing throughout Oklahoma. The Outdoor Advertising Association of Oklahoma is an Oklahoma corporation whose membership includes 20 outdoor advertising enterprises engaged

in the business of placing outdoor advertising throughout the State of Oklahoma. The Oklahoma Press Association and the Outdoor Advertising Association of Oklahoma, on behalf of themselves and their members, have joined as plaintiffs in a suit against Richard A. Crisp, the Director of the Oklahoma Alcoholic Beverage Control Board, the respondent in this matter.

This suit of the Oklahoma Press Association and of the Outdoor Advertising Association of Oklahoma seeks a declaration that enforcement of article 27, section 5 of the Oklahoma Constitution and of 37 Okla. Stat. § 516 (1981) by Richard A. Crisp would injure or destroy rights inuring to the Oklahoma Press Association and the Outdoor Advertising Association of Oklahoma and to their members under the First and Fourteenth Amendments to the United States Constitution to publish advertisements of alcoholic beverages. The Oklahoma Press Association and the Outdoor Advertising Association of Oklahoma also seek an injunction to prevent Richard A. Crisp from enforcing these provisions of the Oklahoma Statutes and Oklahoma Constitution.

On February 10, 1982, the Honorable Lee R. West preliminarily enjoined Richard A. Crisp from enforcement of Oklahoma's constitutional and statutory provisions prohibiting the advertisement of alcoholic beverages against the Oklahoma Press Association and the Outdoor Advertising Association of Oklahoma and their members. The primary reasons stated by the court for its order of the preliminary injunction were (1) that the Oklahoma Press Association and the Outdoor Advertising Association of Oklahoma and their members were still subject to Oklahoma's prohibitions against the advertisement of alcoholic beverages and

(2) that the Oklahoma Press Association and the Outdoor Advertising Association of Oklahoma and their members were in a similar situation regarding the exercise of their First and Fourteenth Amendment rights as had been the plaintiffs in the cases of *Oklahoma Teecasters Ass'n v. Crisp*, CIV-81-439-W (W.D. Okla., December 18, 1981) and *Cablecom-General, Inc. v. Crisp*, CIV-81-290-W (W.D. Okla. December 18, 1981). The plaintiffs of *Cablecom-General, Inc. v. Crisp*, CIV-81-290-W (W.D. Okla. December 18, 1981) are the petitioners in the present matter.

On May 19, 1982, the Honorable Lee R. West entered an order staying *Oklahoma Press Ass'n v. Crisp*, CIV-82-44-W (W.D. Okla.). The court entered the stay because appeal before the United States Court of Appeals for the Tenth Circuit had been instituted and involved the same legal issues stated against the same defendant and because the decision of the United States Court of Appeals for the Tenth Circuit might dispose of some, if not all, the issues in the stayed proceedings. On January 24, 1983, the United States Court of Appeals for the Tenth Circuit decided *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490 (10th Cir. 1983). On February 15, 1983, the mandate from the Tenth Circuit issued to the Western District of Oklahoma in *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490, No. 82-1058 (10th Cir. 1983). On April 4, 1983, issuance of the mandate from the Tenth Circuit to the Western District of Oklahoma was stayed pending this Court's disposition of the present petition for certiorari in *Cablecom-General, Inc. v. Crisp*, 699 F.2d 490, No. 82-1061 (10th Cir. 1983).

The preliminary injunctions granted to the Oklahoma Press Association and the Outdoor Advertising Association

of Oklahoma are still in effect. Their dissolution will presently be considered in light of the Tenth Circuit's opinion in *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490 (10th Cir. 1983). The action taken by this Court on the Petition for Writ of Certiorari in this matter will in all practical and actual effect dispose of some, if not all, of the issues in *Oklahoma Press Ass'n v. Crisp*, CIV-82-44-W (W.D. Okla.), currently stayed before the United States District Court for the Western District of Oklahoma.

Consequently, the interests of the Oklahoma Press Association and the Outdoor Advertising Association of Oklahoma are substantially identical to the interests of the petitioners requesting Writ of Certiorari from this Court to the United States Court of Appeals for the Tenth Circuit.

SUMMARY OF ARGUMENT

The decision of the court below allows the State of Oklahoma to continue an absolute and blanket suppression of truthful advertising of a lawful product despite this Court's general admonitions that a state may not single out commercial speech of a particular content and seek to prevent its dissemination completely and that a state may not discourage purchase of an advertised product by suppressing commercial speech concerning that product. The decision below further allows this complete ban of commercial speech to stand despite this Court's statements concerning the circumstances under which a blanket suppression and ban may be enacted. The commercial speech banned by Oklahoma is neither misleading nor related to an unlawful activity, yet the court below upholds the state's ban of such commercial communications.

The court below allows this ban even though this Court in particular cases has supported the proposition that absolute bans of commercial communications are not permitted by the First Amendment unless they are misleading or related to unlawful activity. In so doing, the decision below has failed to enforce those interests that are at the heart of the First Amendment's concern in protecting commercial speech, that is, that the flow of commercial information be free in order that individual and societal interests in informed and reliable decision making concerning the availability, nature and prices of products and services be preserved.

The decision of the court below incorrectly has balanced the relationship between the Twenty-first Amendment and the First Amendment. In balancing this relationship, the court below has decided that a state's power under the Twenty-first Amendment to ban entirely the sale and consumption of alcoholic beverages necessarily entails any regulation of commercial speech concerning alcoholic beverages, including the outright ban of such speech. The court has analyzed all states who have chosen to prohibit some but not all forms of liquor advertising with the goal of decreasing the consumption and abuse of alcoholic beverages to be similarly situated regarding any First Amendment restrictions on their ability to regulate alcoholic beverage advertising. Because Oklahoma's allowed communication concerning alcoholic beverages is at the limit of the smallest communication that may be permitted, the court below has stated that the State's power to ban the sale and consumption of alcoholic beverages is the same thing as the power to ban commercial communications concerning

alcoholic beverages. That decision ignores this Court's statements to the contrary, which require that conflicts between the Twenty-first Amendment and other parts of the Constitution be resolved by the analyses existing under the law concerning those parts of the Constitution.

ARGUMENT

I. THE DECISION OF THE COURT BELOW AFFIRMS A BLANKET SUPPRESSION OF COMMERCIAL SPEECH OF A PARTICULAR CONTENT IN CONFLICT WITH THE DECISIONS OF THIS COURT.

The decision¹ of the court below, the United States Court of Appeals for the Tenth Circuit, allows the State of Oklahoma to continue an absolute and blanket suppression² of truthful advertising of a lawful product despite this Court's admonitions to the contrary. This Court has stated that a state may not single out speech of a particular content and seek to prevent its dissemination completely. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976). Further, it is

¹ *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490 (10th Cir. 1983).

² Article 27, section 5 of the Oklahoma Constitution makes it "unlawful for any person, firm or corporation to advertise the sale of alcoholic beverages within the State of Oklahoma, except one sign at the retail outlet bearing the words 'Retail Alcoholic Liquor Store.'" The Oklahoma Statutes enact this constitutional prohibition as follows: "it shall be unlawful for any person, firm or corporation to advertise any alcoholic beverages or the sale of same within the State of Oklahoma, except one sign at the retail outlet bearing the words 'Retail Alcoholic Liquor Store' or any combination of such words, or any of them, and no letter in any such sign shall be more than four (4) inches in height, or more than three (3) inches in width, and if more than one line is used, the lines shall not be more than one (1) inch apart." 37 Okla. Stat. § 516 (1981).

highly doubtful whether commercial speech may be suppressed in order to further a state's interest in discouraging purchase of the advertised product. *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566 n.9 (1980). Nevertheless, the United States Court of Appeals for the Tenth Circuit has approved provisions of Oklahoma law³ that single out speech having the particular content of advertising alcoholic beverages and seek to prevent its dissemination completely. In addition, the court below approved Oklahoma's suppression of liquor advertising even though it recognized that Oklahoma's interest in prohibiting the advertising of alcoholic beverages was to discourage purchase of the advertised product, that is, "to reduce the sale and consumption of liquor, and thereby reduce the problems associated with alcohol abuse."⁴

The decision of the court below approves Oklahoma's blanket suppression and ban of alcoholic beverage advertising contrarily to decisions of this Court stating under what circumstances such a blanket suppression and ban may be enacted. A state may ban those forms of commercial communication more likely to deceive the public than to inform it and that commercial speech related to an illegal activity. A state's power to ban commercial communications that are neither misleading nor related to unlawful activity is a power more circumscribed than the power to ban those communications. *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 563-64 (1980). This principle of *Central Hudson Gas* was later refined in the case of *In re R.M.J.*, 102 S.Ct. 929 (1982).

³ Okla. Const. art. 27, § 5; 37 Okla. Stat. § 516 (1981).

⁴ *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d at 500.

This Court there declared that a state may justify an absolute prohibition of a particular content or method of advertising only if the advertising is inherently misleading or demonstrably misleading from past experience. In addition, a state may not absolutely prohibit advertising that is only potentially misleading. *In re R.M.J.*, 102 S.Ct. 929, 937 (1982). Despite these statements of this Court, the court below sanctioned Oklahoma's absolute prohibition and blanket ban on commercial speech having the particular content of advertising alcoholic beverages even though the court below recognized that the advertisements in question were neither false nor misleading.⁵

In recent years, this Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity. *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566 n.9 (1980). The decision below ignores the truth of this statement as found in the particular decisions of this Court. For example, the absolute prohibition on advertising of areas of attorney practice in language other than that specifically provided by ethical rule violates the First Amendment. *In re R.M.J.*, 102 S.Ct. 929, 938 (1982). In addition, the absolute prohibition on advertising by courts of states in which an attorney has been admitted to practice violates the First Amendment. *Id.* This Court has found that the complete suppression of an electric utility's promotional advertising impermissibly abridges free speech. *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 571 (1980). Moreover, this Court has held

⁵ *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d at 499-500 nn. 7-9.

that the absolute prohibition of price advertising of prescription drugs also violates the First Amendment. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1976). All these decisions find impermissible an absolute prohibition of commercial speech of a certain content.

The decision below, in ignoring these decisions, further ignores the principle that the informational function of advertising is at the heart of the First Amendment's concern in protecting commercial speech. *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 563 (1980). A commercial advertisement is constitutionally protected not so much because it pertains to the seller's business as because it furthers the societal interest in the "free flow of commercial information." *First National Bank of Bellotti*, 435 U.S. 765, 783 (1978); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 764 (1976). The decision below repudiates this societal interest in the free flow of commercial information by denying the public's right to be informed "of the availability, nature, and prices of products and services . . ." concerning alcoholic beverages. *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977). "[S]uch speech serves individual and societal interest in assuring informed and reliable decisionmaking." *Id.* The decision below permits the State of Oklahoma to decide for each individual in Oklahoma that he has no interest in informed and reliable decisionmaking concerning the availability, nature, and prices of products and services associated with alcoholic beverages. The court below permits this statist interruption in the flow of commercial information even though

it finds that "[t]he sale and consumption of alcoholic beverages, though heavily regulated, is lawful within the State of Oklahoma."⁶ The decision below thus conflicts with this Court's statement of the fundamental principle underlying the First Amendment's protection for commercial speech. "[A] State may not completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 773 (1976). The First Amendment requires an alternative to this highly paternalistic approach. "That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." *Id.* at 770. Liquor "[a]dvertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price"⁷ *Id.* at 765.

⁶ *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d at 500. See also Oklahoma Alcoholic Beverage Control Act, 37 Okla. Stat. §§ 501-563 (1981).

⁷ This Court in *Virginia Pharmacy* noted: "Obviously, not all commercial messages contain the same or even a very great public interest element. There are a few to which such an element, however, could not be added." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 764 (1976). Various aspects of the sale and consumption of alcoholic beverages recur as objects of political concern in Oklahoma. For example, the latest recurrence of the ongoing attempt to legalize liquor by the drink in Oklahoma is a recently announced initiative petition drive for a county option plan that would allow the voters of each county to decide whether that county should be wet or

II. THE COURT BELOW HAS DECIDED AN IMPORTANT CONSTITUTIONAL QUESTION CONCERNING THE RELATIONSHIP OF THE TWENTY-FIRST AMENDMENT AND THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION IN CONFLICT WITH THE DECISIONS OF THIS COURT.

The United States Court of Appeals for the Tenth Circuit in its decision below has decided the proposition that a state in exercising its powers under the Twenty-first Amendment may engage in all forms of speech-burdensome regulation of alcoholic beverages as an incident of its Twenty-first Amendment power to ban completely the sale and distribution of alcoholic beverages within the state. The court below decided that proposition in the affirmative even though no published decision of this Court has established this proposition. The court below relied heavily on *Queensgate Investment Company v. Liquor Control Commission*,⁸ a summary decision of this Court.

⁷(Continued)

dry. See The Daily Oklahoman, June 16, 1983, at p.8, col. 3. The conflation of political and commercial messages concerning alcoholic beverages is an obvious method by which liquor producers may advertise their products. "Drink Seagram's and support liquor by the drink," and, "Vote to drink Seagram's by the drink," are but two crude examples. The net result of this joinder of political and commercial expression available to liquor advertisers in Oklahoma is that allowing the decision of the court below to stand requires this Court potentially to participate in the replication of vain acts of combining political assertions of public interest with commercial speech concerning alcoholic beverages. Cf. *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975) (commercial advertisement also containing factual material of clear public interest).

⁸ 103 S.Ct. 31 (1982). This summary dismissal dismissed an appeal from the Ohio Supreme Court, whose decision is reported *eo nomine* at 433 N.E.2d 138 (Ohio 1982).

The court below found that *Queensgate* was precedential authority for the proposition that "the Twenty-first Amendment in some way enhances a state's authority to regulate commercial speech concerning alcoholic beverages."⁹ The court below further found a "crucial similarity" between *Queensgate* and the present case: "in both cases, the state, acting under its powers granted by the Twenty-first Amendment, has chosen to prohibit some, but not all,¹⁰ forms of liquor advertising with the goal of decreasing the consumption and abuse of alcoholic beverages."¹¹ The court reasoned that because Oklahoma allows liquor advertising on one sign at a retail liquor store¹² and by exercise of administrative discretion, Oklahoma

⁹ *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d at 497.

¹⁰ This analysis by the court below of the similarity between Ohio's scheme of regulating liquor advertising and Oklahoma's scheme is fairly ludicrous. Oklahoma prohibits all communications of liquor advertising by all speakers in all media except the communications explicit and implicit in the four words "Retail Alcoholic Liquor Store" allowed on one sign at a retail liquor store. Okla. Const. art. 27, § 5; 37 Okla. Stat. § 517 (1981). Consequently, Oklahoma completely prohibits all other communications by all other speakers in all other media concerning liquor advertising. Ohio *allows* all communications of liquor advertising by all speakers in all media except that certain liquor permit holders may not advertise the price per bottle or drink of any alcoholic beverage nor may they in any manner refer to price or price advantage except within their premises. *Queensgate Investment Co. v. Liquor Control Commission*, 433 N.E.2d at 139 n.1. This analysis by the court below of this "crucial similarity" is further called into question by that court's recognition that the Oklahoma "laws here in question are indeed broader than the regulation in *Queensgate*. . . ." *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d at 497.

¹¹ *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d at 497.

¹² Okla. Const. art. 27, § 5; 37 Okla. Stat. § 516 (1981).

"allows"¹³ liquor advertising. Nevertheless, liquor adver-

¹³ The Tenth Circuit noted: "On-premises advertising is allowed, the rebroadcast of beer advertising is not prohibited, and alcoholic beverage advertising in out-of-state printed publications distributed in Oklahoma is allowed. Although Appellees bear a disproportionate burden of the regulation, Oklahoma has not eliminated the dissemination of information concerning alcoholic beverages. With particular emphasis on the power of Oklahoma under the Twenty-first Amendment, we hold that the advertising prohibitions here are no more extensive than is necessary to serve Oklahoma's asserted interest. Article XXVII, § 5 of the Oklahoma Constitution and Section 516 of title 37 of the Oklahoma Statutes, are valid restrictions on commercial speech and do not violate the Appellees' First Amendment rights." *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d at 502.

It is unclear what part the exercise of administrative discretion by the Director of the Oklahoma Alcoholic Beverage Control Board not to enforce Oklahoma's liquor advertising laws against certain advertisers or concerning certain subjects influences the court below. To the extent that the decision of the court below was influenced in Oklahoma's favor by this exercise of administrative discretion, the court below has failed to recognize that a person having merely a commercial interest in speech may "challenge the facial validity of a statute on the grounds of its substantial infringement of the First amendment interests of others." *Metro-media, Inc. v. City of San Diego*, 453 U.S. 490, 504 n.11 (1981). The court below has further failed to follow the example of this Court in assuming that a statute facially attacked on the basis of commercial speech actually effectuates its goals and purposes. See *Larkin v. Grendel's Den, Inc.*, 103 S.Ct. 505, 510 n.6 (1982).

To the extent that this exercise of administrative discretion did not form a part of the decision below, the court below failed to consider whether this exercise of administrative discretion was consonant with First Amendment values. A more complete record would be necessary to consider this question properly.

Further, to state that the rebroadcast of beer advertising is not prohibited overstates the situation in Oklahoma. Two kinds of beer are sold in Oklahoma, a nonalcoholic beverage containing less than 3.2% of alcohol by weight, and an alcoholic beverage containing more than 3.2% alcohol by weight. Until recently, more beer in Oklahoma was sold by

tising in Oklahoma, as advertising is commonly thought

¹³ (Continued)

brewers who marketed both an alcoholic and a nonalcoholic beer in the same packaging except for the notation of the alcohol content. In a franchising dispute with the State of Oklahoma unrelated to the present advertising question, most or all of these brewers marketing both alcoholic and nonalcoholic beer in Oklahoma ceased to market alcoholic beer in Oklahoma. Before this withdrawal from the state of alcoholic beer, beer advertising for alcoholic and nonalcoholic beer was indistinguishable. Since this withdrawal, beer advertising is for nonalcoholic beer only.

Another set of brewers have marketed only alcoholic beer in the State of Oklahoma. Since the withdrawal of the major brands of their alcoholic beer from Oklahoma, Oklahoma has seen many new marketers of alcoholic beer enter the Oklahoma market. To the knowledge of these friends of the court, advertisement of a beer marketed in Oklahoma only as alcoholic beer is not permitted. These friends of the Court suspect that the court below has been misled concerning the regulation of alcoholic beverages in Oklahoma. For example, Oklahoma has been able to rely on the Oklahoma Alcoholic Beverage Control Act, 37 Okla. Stat. §§ 501-563 (1981), to establish that the "sale and consumption of alcoholic beverages though heavily regulated, is lawful within the State of Oklahoma." *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d at 500. In reality, the arbitrary exercise of administrative discretion in selecting which provisions of the Oklahoma Alcoholic Beverage Control Act to enforce are far more egregious than anyone outside Oklahoma is likely to realize. Although it is illegal to serve an alcoholic beverage by the drink or by the glass in Oklahoma, owners of taverns, restaurants and bars in the counties containing and surrounding Oklahoma's two urban areas, Tulsa and Oklahoma City, routinely serve alcoholic beverages by the glass or drink with impunity, often having daily or weekly "happy hours" during the afternoon traffic rush. Observers of the Oklahoma scene would find that the State of Oklahoma makes little or no attempt to discourage this activity. Nevertheless, at the same time, the Oklahoma Alcoholic Beverage Control Board wishes to pass itself off as representing the interests of the people against the interests of those beverage marketers who wish to encourage even higher levels of intoxication. In reality, enforcement of the Oklahoma Alcoholic Beverage Control Act is in no small state of disarray, and arbitrary exercises of administrative discretion are common.

of,¹⁴ is completely prohibited, and the court below has decided that a state may exercise Twenty-first Amendment powers to infringe upon commercial expression in any manner it chooses short of the total eradication of the indications of commercial existence¹⁵ that would be justified in association with a state's making the sale and consumption of alcoholic beverages illegal.

Because of its Twenty-first Amendment analysis, the court below found the asserted state interest of Oklahoma to be "exceptionally strong."¹⁶ In its balancing the values¹⁷ of this "exceptionally strong" asserted state interest against First Amendment values, the court below failed to recognize what this Court has long recognized: "that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment." *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 103 S.Ct. 1365, 1376 (1983).

¹⁴ Not all forms of advertising increase the overall sale of a particular product. See Note, *Electric & Gas Utility Advertising: The First Amendment Legacy of Central Hudson Gas*, 60 Wash. U.L.Q. 459 (1981). The Oklahoma provisions reach all liquor advertising, regardless of the impact of the touted liquor on overall liquor consumption. Cf. *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. at 570.

¹⁵ E.g., signs advertising that alcoholic beverages are for sale at a particular business location.

¹⁶ *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d at 500.

¹⁷ The court below stated the issue of the present matter as follows: "The resolution of this issue involves an examination of the relative interests at stake; that is, we must balance the right of Telecasters and the cable operators to engage in commercial speech against the right of Oklahoma, through its general police powers as enhanced by the Twenty-first Amendment, to regulate commercial speech relating to alcoholic beverages." *Ok-*

Although the Twenty-first Amendment grants states wide latitude in state liquor regulation, this Court has resisted the notion that the Twenty-first Amendment frees the states from all restrictions upon the police power to be found in other provisions of the Constitution. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 108 (1980). Indeed, decisions of this Court:

have stressed that important federal interests in liquor matters survived the ratification of the Twenty-first Amendment. The States cannot tax imported liquor in violation of the Export-Import Clause. *Department of Revenue v. James Beam Company*, 377 U.S. 341, 84 S.Ct. 1247, 12 L.Ed.2d 362 (1964). Nor can they insu-

17 (Continued)

Oklahoma Telecasters Ass'n v. Crisp, 699 F.2d at 498. The court below then assertedly applied the analysis of *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), in order to balance these rights. *Id.* at 499-502.

The citations of law afforded by this brief have been presented within a predominantly categorical framework. These categorical formulations are particularly applicable to the fourth part of the description of commercial speech analysis presented in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566 (1980); the government regulation must not be more extensive than is necessary to serve the asserted governmental interest. Indeed, the court below has misconceived this fourth part of the *Central Hudson Gas* formulation: "With particular emphasis on the power of Oklahoma under the Twenty-first Amendment, we hold that the advertising prohibitions here are no more extensive than is necessary to serve Oklahoma's asserted interest." *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d at 502. This Court has recently given indication of the application of this fourth part of the *Central Hudson Gas* formulation. Where it is not clear that an absolute prohibition on commercial speech is the only solution in support of the asserted state interest and there is no indication of a failed effort by a state to proceed along a less restrictive path in order to further its interests, a restriction on commercial speech must fall. *In re R.M.J.*, 102 S.Ct. 929, 939 (1982).

late the liquor industry from the Fourteenth Amendment's requirements of equal protection, *Craig v. Boren*, 429 U.S. 190, 204-209, 97 S.Ct. 451, 460-463, 50 L.Ed.2d 397 (1976), and due process, *Wisconsin v. Constantineau*, 400 U.S. 433, 436, 91 S.Ct. 507, 509, 21 L.Ed.2d 515 (1971).

Id. Nor may a state exercise its power under the Twenty-first Amendment in a way that impinges upon the Establishment Clause of the First Amendment. *Larkin v. Grendel's Den, Inc.*, 103 S.Ct. 505, 510 n.5 (1982).

The court below has overbalanced Oklahoma's interest in favor of the Twenty-first Amendment and has failed to recognize that the First Amendment is the device determining the extent of state "regulation of advertising . . . related to activities the state may legitimately regulate or even prohibit." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 760-61 (1976) (emphasis added). Further, the court below has failed to recognize that it "is precisely this kind of choice, between the dangers of suppressing information, the dangers of its

¹⁷ (Continued)

Oklahoma repealed prohibition and adopted the current advertising restrictions simultaneously, and Oklahoma has never attempted any method of regulation other than an all-out prohibition of alcoholic beverage advertising. See *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d at 502 (concurring opinion). At least one commentator has stated that the commercial speech cases of this Court are explained by this Court's procedure of assuming that commercial speech should be covered by the First Amendment and then subcategories of commercial advertising should be excluded only if they are "shown to be unrelated to the purposes of a principle of freedom of speech." Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 Vand. L. Rev. 265 (1981). At the least, Oklahoma's prohibitions reach liquor advertising having no effect on overall liquor consumption (e.g., market share advertising). See note 14 *supra*.

misuse if it is freely available, that the First Amendment makes for us.” *Id.* at 770.

Finally, the decision below fails to recognize that the potential of Oklahoma to make legal or illegal commercial activity forming the subject matter of advertising cannot justify a restriction on the speech of a commercial speaker. Thus, a state's power to create a corporation does not, in and of itself, justify a restriction on that corporation's speech. *First National Bank v. Bellotti*, 435 U.S. 765, 778 n.14, 780 n.16 (1978). That Oklahoma may make the sale and consumption of liquor illegal cannot justify restrictions on speech concerning that activity. The decision below thus fails to recognize that the “inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of its source. . . .” *Id.* at 777.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted to review the judgment of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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